Supreme Court, U.S.
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No. 96 - 340

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

MATTIE L. VAUGHN, M.D.,

Petitioner,

v.

THE STATE MEDICAL BOARD OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED iv

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. Introduction 3

II. Certiorari Should Not Be Granted Because (1) The Cruel and Unusual Punishment Clause Does Not Apply to the Revocation of a Medical License, and (2) the Sanction Imposed Here Was Not Disproportionate to the Violations Found. 3

III. Certiorari Should Not Be Granted Because (1) The Right of Allocution Does Not Apply to State Licensure Disciplinary Proceedings and (2) Dr. Vaughn was Provided a Sufficient Opportunity to Present Evidence of Mitigation. 4

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Alexander v. United States,
509 U.S. 544 (1993) 5

Boddie v. Connecticut,
401 U.S. 371, 379 (1971) 8

Dent v. West Virginia,
129 U.S. 114 (1888) 6

Goldberg v. Kelly,
397 U.S. 254 (1970) 8

Green v. United States,
365 U.S. 301 (1961) 7

Hawker v. New York,
170 U.S. 189 (1898) 6

Ingraham v. Wright,
430 U.S. 651 (1977) 5

Keney v. Derbyshire,
718 F.2d 352 (10th Cir. 1983) 9

Kvitka v. Board of Registration in Medicine,
407 Mass. 140, 551 N.E.2d 915 (1990),
cert. denied 498 U.S. 823 (1990) 6

Loui v. Board of Medical Examiners,
78 Hawaii 21, 889 P.2d 705 (1995) 5

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VIII 4

Ohio Rev. Code § 4731.22 1
(The Medical Practices Act)

Ohio Rev. Code § 4731.22(B)(3) 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The version of Ohio Rev. Code § 4731.22 (the Ohio Medical Practices Act) that is set forth in Appendix W of the Petition reflects amendments to the statute as of June 1996, and so is not the version that was in effect on September 29, 1986, when the Respondent State Medical Board of Ohio initiated the disciplinary proceedings against Petitioner Dr. Vaughn that are the subject of this case. Therefore, reprinted in Appendix A hereto is Ohio Rev. Code § 4731.22 as in effect on September 29, 1986.

STATEMENT OF THE CASE

Petitioner, Mattie L. Vaughn, M.D. (Dr. Vaughn) asks this Court to review a state court of appeals decision which affirmed the revocation of Dr. Vaughn's medical license by the Respondent, the State Medical Board of Ohio (the Medical Board). Dr. Vaughn asserts that the revocation of her medical license was "cruel and unusual punishment" under the Eighth Amendment to the United States Constitution, even though this Court has traditionally refused to extend such protection beyond criminal proceedings, and even though the State courts found the sanctions imposed to be appropriate to Dr. Vaughn's violations of the Medical Practices Act, Ohio Rev. Code § 4731.22. Dr. Vaughn likewise asserts that she should have been accorded a "right of allocution" prior to the Medical Board's decision to revoke her license, even though that right again has been historically limited to criminal proceedings, and even though Dr. Vaughn had already been given ample opportunities to present her case and arguments.

For the most part, Dr. Vaughn's Statement of the Case is factually accurate. However, she has neglected to tell this Court what the charges brought by the Medical Board against her were really about.

Indeed, the facts established at the administrative hearing were clear and undisputed. Dr. Vaughn's medical practice was little more than a diet pill "mill." Dr Vaughn established protocols under which diet patients were given a cursory history and physical by her non-physician office staff. The staff would then issue prescriptions to the patients for a one-month supply of Obetrol, a Schedule II amphetamine, using prescription forms which Dr. Vaughn had pre-signed in blank. The Obetrol was subsequently alternated on a monthly basis with a Schedule III or Schedule IV anorectic medication. In this manner, some sixty to seventy patients were seen per day. Patients were seen in this manner whether or not Dr. Vaughn was in the office; testimony established that she was not in her office at least one to two days per week, and that even new patients would be accepted and treated in this manner by the office staff in Dr. Vaughn's absence.

The testimony also established that the patients would be issued these prescriptions prior to receipt of laboratory test results, and that known contraindications for the drugs (for example, hypertension and possible pregnancy) were ignored. Further, patients were continued on the amphetamine/anorectics for inappropriately long periods of time, often more than three months. Expert testimony established that Dr. Vaughn's care and treatment of the diet patients fell substantially below minimal standards of care and that she prescribed drugs for those patients without any legal and legitimate therapeutic purpose.

Dr. Vaughn mentions several times in her Petition that she was not represented by counsel at her administrative hearing. However, she was advised of her right to counsel several times prior to the commencement of the hearing, and she chose to go forward by representing herself. By the time that the Board itself initially considered her case, she had retained counsel, and has been represented continuously since, including on remand.

Dr. Vaughn appealed the Board's initial order revoking her license to practice medicine. As the result of that appeal, the Board's order that Dr. Vaughn violated the Medical Practices Act was affirmed in its entirety, except for one provision that had to do with whether she had improperly received something of value for referrals to a particular pharmacy. All of the most serious of the Board's findings, having to do with Dr. Vaughn's prescribing practices and departures from the minimum standards of care, were affirmed by the appellate court. (Petition Appendix M).[1] As a

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[1] In her Petition at 7, Dr. Vaughn notes that the court of appeals found that the lower court had "erred in failing to consider certain evidence." However, the evidence that the lower court failed to consider was evidence that Dr. Vaughn's prescribing of controlled substances had no *legitimate* therapeutic purpose. Based upon this evidence, the court of appeals sustained a cross-appeal filed by the Board and affirmed the Board's finding that Dr. Vaughn had violated Ohio Rev. Code § 4731.22(B)(3), by

result of its decision, the court remanded the case back to the Board for the entry of a new order.

The complaints presented by Dr. Vaughn in her Petition have to do with the Board's compliance with the court's remand order. In accordance with that order, the Board again considered the case against Dr. Vaughn at its meeting on August 11, 1993. Dr. Vaughn, through counsel, insisted that she had a right to present both "new" and "mitigating" evidence. The Board, however, refused to hear such additional evidence on the grounds that Dr. Vaughn had already had more than sufficient opportunity to be heard on the issues during the administrative hearing and subsequent appeals. The Board concluded that, even with the elimination of the referral issue, more than sufficient evidence had been presented that justified the revocation of Dr. Vaughn's medical license, and so entered a new revocation order. The Petition seeks to overturn the state courts' affirmance of that decision.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Introduction

Dr. Vaughn asks this Court to review the decision of the Ohio courts in this state medical licensure disciplinary proceeding on the grounds that it presents substantial questions arising under the United States Constitution. Dr. Vaughn does not assert that the case presents an important federal question decided by the Ohio courts in conflict with another state court of last resort, or in conflict with a United States court of appeals. Indeed, no other state or federal courts have agreed that the Eighth Amendment prohibition against cruel and unusual punishment is applicable to state licensure disciplinary proceedings. Likewise, no other state or federal courts have found that the right of allocution recognized

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prescribing drugs "for other than legal *and legitimate* therapeutic purposes."

in criminal cases is applicable under the due process clause of the Fourteenth Amendment to such disciplinary proceedings.

Further, Dr. Vaughn does not assert that the decision of the Ohio courts in this case conflicts with any relevant decisions of this Court. Rather, Dr. Vaughn claims that the decision of the Ohio courts on her purported constitutional claims is one of first impression for this Court. She forgets that, as will be explained below, the decisions of this Court lay no foundation whatsoever for her claims that concepts which historically have been applied only in the criminal context should apply to state licensure disciplinary proceedings.

When stripped of hyperbole and rhetoric, this case is only about Dr. Vaughn individually, and whether the state of Ohio has properly decided that she should no longer be afforded the privilege of practicing medicine. Such a decision is one properly made by the state in the exercise of its police power, in accordance with the responsibility of the state to protect the health and safety of its citizens by prohibiting the practice of medicine by unqualified or incompetent individuals. There is simply no reason for this Court to hear this case.

II. Certiorari Should Not Be Granted Because (1) The Cruel and Unusual Punishment Clause Does Not Apply to the Revocation of a Medical License, and (2) the Sanction Imposed Here Was Not Disproportionate to the Violations Found.

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Dr. Vaughn argues vaguely in her Petition that the Ohio courts erred in holding that the revocation of her medical license was not subject to review under this amendment; however, she offers no basis upon which this Court should apply the protection of the cruel and unusual punishment clause to a state medical disciplinary proceeding. Nor

does she offer any explanation why, even if the clause were to be applied, her conduct was not proportionate to the revocation of her medical license.

Indeed, Dr. Vaughn ignores long-standing precedent of this Court refusing to apply the cruel and unusual punishment clause beyond the criminal context. This Court has traditionally found that the text of the clause suggests an intention to limit the power of the *criminal* courts. Hence, in *Ingraham v. Wright,* 430 U.S. 651 (1977), this Court declared that "[a]n examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Id.* at 662.[2] Likewise, in *Alexander v. United States*, 509 U.S. 544 (1993), the Court observed that the cruel and unusual punishment clause is "concerned with matters such as the duration or conditions of confinement", which are clearly matters unique to the criminal context and are irrelevant to medical licensure disciplinary proceedings.

Dr. Vaughn nevertheless asserts that the revocation of a medical license is a "punishment" by the state which should be subject to review under the Eighth Amendment, because the purpose of the revocation is retribution against the physician in question and deterrence of others. To the contrary, such a revocation is imposed to protect the public from a physician who has proven by her conduct that she should not be allowed to practice medicine. *See, e.g. Loui v. Board of Medical Examiners*, 78 Hawaii 21, 889 P.2d 705 (1995) (suspension of medical license serves the legitimate governmental objective of protecting the public from an unfit physician, and so does not violate the double

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[2] In the Petition at p. 18, Dr. Vaughn cites to the *Ingraham* case for the opposite proposition, that is, that the Eighth Amendment has been held applicable to civil proceedings. She fails to note, however, that the portion of the *Ingraham* opinion to which she cites is contained in the dissent, and that the cases cited in that dissent all related to criminal proceedings.

jeopardy clause); and *Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 551 N.E.2d915 (1990), *cert. denied* 498 U.S.823 (1990) (revocation of medical license is considered to be remedial for purposes of the double jeopardy clause). Indeed, as this Court recognized in 1898:

> No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies.

Hawker v. New York, 170 U.S. 189, at 193 (1898) (affirming the constitutionality of a New York statute which prohibited a convicted felon from practicing medicine). *See, also, Dent v. West Virginia*, 129 U.S. 114 (1888) (affirming the right of a state under its police power to require that physicians be licensed and meet specified requirements).

Therefore, the revocation of a medical license is not "punishment" for the purposes of the cruel and unusual punishment clause of the Eighth Amendment. Rather, a medical license is revoked by the state under its authority and responsibility to protect its citizens from unqualified or incompetent practitioners. This was precisely the purpose of the State Medical Board of Ohio in revoking Dr. Vaughn's license; her violations of the laws and rules governing the practice of medicine in the state of Ohio, and her violations of the minimum standards of care, imposed upon the Board an obligation to take action to protect the public.

Moreover, Dr. Vaughn's violations of those laws and standards of care are not before this Court; those were affirmed

during Dr. Vaughn's first round of appeals, and she did not seek review of that affirmance in this Court. The only issue before this Court is whether it should review the revocation imposed by the Board as possibly being "cruel and unusual punishment." As found by the state courts, even if the cruel and unusual punishment clause were to apply, Dr. Vaughn's violations were so egregious as to justify revocation of her license. As a result, this issue is not appropriate for certiorari review.

III. Certiorari Should Not Be Granted Because (1) The Right of Allocution Does Not Apply to State Licensure Disciplinary Proceedings and (2) Dr. Vaughn was Provided a Sufficient Opportunity to Present Evidence of Mitigation.

Dr. Vaughn also argues that she was denied her right to due process under the Fourteenth Amendment to the United States Constitution because she was denied a "right of allocution" before the Board voted (for the second time) to revoke her medical license. In making this argument, she again seeks extension of a concept traditionally limited to the criminal courts. She fails to tell the Court, however, why allocution should be recognized as a procedural due process right *in addition* to the established due process standard of "notice and an opportunity to be heard," which were fully complied with in this case. In addition, Dr. Vaughn has failed to tell the Court why she should have been given yet *another* opportunity to speak, when she had already had an opportunity to present mitigation at her original hearing and the remand was only to consider the impact that one of the original charges had been reversed.

The right of allocution is an ancient common law right, recognized since at least the 1600s. Like the cruel and unusual punishment clause, it has traditionally been applied only in the context of *criminal* proceedings. *Green v. United States*, 365 U.S. 301 (1961).

As admitted by Dr. Vaughn, a right of allocution has never been applied by this Court to administrative disciplinary proceedings concerning professional licenses. Indeed, as explained above, the Board's decision to revoke her medical license was not "sentencing" in the same manner as is the sentencing of a convicted criminal. The criminal defendant is sentenced as punishment for the crimes committed; the revocation of a medical license, on the other hand, is remedial in nature, and is done to protect the public.

Dr. Vaughn cites no cases whatsoever that apply a right of allocution to an administrative disciplinary proceeding, or to any other non-criminal proceeding. The reason there are no such cases is obvious: the criminal defendant's liberty interests prior to sentencing are much more compelling than the administrative respondent's property interests in his license to practice his profession.

Due process in the administrative arena means notice and an opportunity to be heard. The concept that procedural due process has been given if an *opportunity* to be heard has been provided is well-settled. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254 (1970). The requirement of the due process clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

As found by the court of appeals, Dr. Vaughn had already been afforded *more* than sufficient due process prior to the point where she now claims that she should have been afforded a "right of allocution." She had been given a full administrative hearing, at which she was permitted to appear, present evidence, and examine witnesses testifying for and against her. She had then availed herself of her right to appeal the Board's original order through three levels of Ohio courts. When the case was returned to the Board in 1993, those courts had affirmed that Dr. Vaughn had violated the minimal standards of care by her prescribing and patient care practices.

In reality, what Dr. Vaughn wanted to do by exercising a so-called "right of allocution" was to present new and additional evidence to the Board, when her violations had already been affirmed by the Ohio courts. Indeed, her request to the Board for a new mitigation hearing was for the purpose of presenting evidence of her conduct subsequent to the violations and the initial Board order. Thus, she wanted the chance to re-try her case. Such a right to *additional* due process would simply be excessive in the context of such an administrative proceeding. *See, e.g. Keney v. Derbyshire*, 718 F.2d 352 (10th Cir. 1983) (physician's claim that due process entitled him to a probable cause hearing before being formally charged with misconduct, in addition to an evidentiary hearing on the charges themselves, was excessive in a license revocation setting). The Ohio court of appeals correctly found that Dr. Vaughn had already *had* all of the process due to her, and that she had no further constitutional right "to be heard," simply because her case and her appeals had been pending for several years.

No valid constitutional issue is presented, but even if such an issue were presented generally, the issue is simply not presented under the facts of this case. As a result, certiorari review is again inappropriate.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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APPENDIX A

Ohio Rev. Code § 4731.22,
as in effect from March 24, 1986 until March 17, 1987

4731.22 Grounds for refusal to grant and revocation of certificate; hearing and investigation; report.

(A) The state medical board, by a vote of not less than six of its members, may revoke or may refuse to grant a certificate to a person found by the board to have committed fraud in passing the examination or to have committed fraud, misrepresentation, or deception in applying for or securing any license or certificate issued by the board.

(B) The board, by a vote of not less than six members, shall, to the extent permitted by law, limit, revoke, or suspend a certificate, refuse to register or refuse to reinstate an applicant, or reprimand or place on probation the holder of a certificate for one or more of the following reasons:

(1) Permitting one's name or one's certificate of registration to be used by a person, group, or corporation when the individual concerned is not actually directing the treatment given;

(2) Failure to use reasonable care discrimination in the administration of drugs, or failure to employ acceptable scientific methods in the selection of drugs or other modalities for treatment of disease;

(3) Selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes or conviction of violation of any federal or state law regulating the possession, distribution, or use of any drug;

(4) Wilfully betraying a professional confidence or engaging in the division of fees for referral of patients, or the receiving of a thing of value in return for a specific referral of a patient to utilize a particular service or business;

(5) Soliciting patients or publishing a false, fraudulent, deceptive, or misleading statement.

As used in this division, "false, fraudulent, deceptive, or misleading statement" means a statement that includes a

misrepresentation of fact, is likely to mislead or deceive because of a failure to disclose material facts, is intended or is likely to create false or unjustified expectations of favorable results, or includes representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

(6) A departure from, or the failure to conform to, minimal standards of care of similar practitioners under the same or similar circumstances, whether or not actual injury to a patient is established;

(7) Representing, with the purpose of obtaining compensation or other advantage for himself or for any other person, that an incurable disease or injury, or other incurable condition, can be permanently cured;

(8) The obtaining of, or attempting to obtain, money or anything of value by fraudulent misrepresentations in the course of practice;

(9) Conviction of a felony whether or not committed in the course of his practice;

(10) Conviction of a misdemeanor committed in the course of his practice:

(11) Violation of the conditions of limitation placed by the board upon a certificate to practice or violation of the conditions of limitation upon which a limited or temporary registration or certificate to practice is issued;

(12) Failure to pay license renewal fees specified in this chapter;

(13) Any division of fees or charges, or any agreement or arrangement to share fees or charges, made by any person licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery with any other person so licensed, or with any person;

(14) The violation of any provision of a code of ethics of a national professional organization as specified in this division. "National professional organization" means the American medical association, the American osteopathic association, the American podiatry association, and such other national professional organizations as are determined, by rule, by the state medical board. The state medical board shall obtain and keep on file

current copies of the codes of ethics of the various national professional organizations. The practitioner whose certificate is being suspended or revoked shall not be found to have violated any provision of a code of ethics of an organization not appropriate to his profession.

(15) Inability to practice according to acceptable and prevailing standards of care by reason of illness, excessive use of alcohol, excessive use of controlled substances, drugs, or chemicals, or as a result of a mental or physical condition. In enforcing this division, the board upon a showing of a possible violation, may compel any individual licensed or certified to practice by this chapter or who has applied for licensure or certification pursuant to this chapter to submit to a mental or physical examination, or both, as required by and at the expense of the board. Failure of any individual to submit to a mental or physical examination when directed constitutes an admission of the allegations against him unless the failure is due to circumstances beyond his control, and a default and final order may be entered without the taking of testimony or presentation of evidence. If the board finds a physician unable to practice because of the reasons set forth in this division, the board shall require such physician to submit to care, counseling, or treatment by physicians approved or designated by the board, as a condition for initial, continued; reinstated, or renewed licensure to practice. An individual licensed by this chapter affected under this section shall be afforded an opportunity to demonstrate to the board that he can resume his practice in compliance with acceptable and prevailing standards under the provisions of his certificate. For the purpose of this section, any individual licensed or certified to practice by this chapter accepts the privilege of practicing in this state, and by so doing or by the making and filing of a registration or application to practice in this state, shall be deemed to have given his consent to submit to a mental or physical examination when directed to do so in writing by the board, and to have waived all objections to the admissibility of testimony or examination reports that constitute a privileged communication.

(16) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring

to violate, any provisions of this chapter or any rule promulgated by the board;

(17) The violation of any abortion rule adopted by the public health council pursuant to section 3701.341 of the Revised Code;

(18) The revocation or suspension by another state of a license or certificate to practice issued by the proper licensing authority of that state for an action that would also have been a violation of this chapter except for nonpayment of fees;

(19) The violation of section 2919.12 of the Revised Code.

(C) Whenever any person holding a valid certificate issued pursuant to Chapter 4731. of the Revised Code, pleads guilty to or is convicted of a violation of Chapter 2907., 2925., or 3719. of the Revised Code or of any substantively comparable ordinance of a municipal corporation in connection with his practice, the prosecutor in the case shall, on forms prescribed and furnished by the state medical board, promptly notify the board of the conviction. As used in this division, "prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

Within thirty days of receipt of such information, the board shall conduct a hearing in accordance with Chapter 119. of the Revised Code to determine whether to suspend or revoke any certificate issued pursuant to Chapter 4731. of the Revised Code.

(D)(1) The board shall investigate evidence which appears to show that any person has violated any provision of this chapter, Chapter 4730. of the Revised Code, or rule of the board. For the purpose of investigation on matters concerning a possible violation of division (B)(3), (8), (9), (10), or (11) of this section, the board may administer oaths, order taking of depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. The hearings and investigations of the board shall be considered civil actions for purposes of section 2305.251 of the Revised Code. In case of disobedience of any person with respect to an order or subpoena issued by the board, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, a judge of the court of common pleas of the county in which the person resides, on application of the board, may compel obedience by

attachment proceedings as for contempt, as in the case of disobedience with respect to the requirements of a subpoena issued from such court or a refusal to testify in such court. Each officer who serves such subpoena shall receive the same fees as a sheriff, and each witness who appears, in obedience to a subpoena, before the board, shall receive the fees and mileage provided for witnesses in civil cases in courts of common pleas. Any person may report to the board under oath any information that the person may have that appears to show a violation of any provision of this chapter, Chapter 4730. of the Revised Code, or rule of the board. In the absence of bad faith, any person who reports such information or who testifies before the board in any adjudication hearing or who testifies before the board in any adjudication hearing conducted under Chapter 119. of the Revised Code shall not be liable for civil damages as a result thereof.

Each complaint or allegation of a violation received by the board shall be assigned a case number and shall be recorded by the board. Investigations of alleged violations of this chapter, Chapter 4730. of the Revised Code, or any rule of the board shall be supervised by a board member selected on a rotating basis by the board. No member of the board who supervises the investigation of a case shall participate in further adjudication of the case.

The board shall conduct all investigations and proceedings in such a manner as to protect patient confidentiality. The board shall obtain the consent of the patient in the form of a written release signed by the patient or by an authorized representative of the patient before seeking access to medical record information concerning a patient for the purpose of any investigation or hearing, except that no such consent is required if there is reason to believe that there has been a violation of division (B)(3) of section 4731.22 of the Revised Code, except that no such consent is given or a waiver of patient privilege exists under division (B) of section 2317.02 of the Revised Code. The board shall not make public names or other identifying information about patients unless proper consent is given or a waiver of the patient privilege unless proper consent is given or a waiver of the patient privilege exists under division (B) of section 2317.02 of the Revised Code, except that no such consent or waiver is required if the board possesses

reliable and substantial evidence that no bona fide physician-patient relationship exists.

(2) If any individual licensed or certified to practice or any association or society of individuals licensed or certified under this chapter believes that a violation of any provision of this chapter, or Chapter 4730. of the Revised Code has occurred, he shall report to the board the information upon which the belief is based. Any person or society who reports under this division and provides such information in good faith shall not be subject to suit for civil damages as a result thereof.

(3) In absence of fraud or bad faith, neither the board nor any member, agent, representative, or employee thereof shall be held liable in damages to any person by reason of investigating or acting upon information presented to it pursuant to this chapter.

(4) On a quarterly basis the board shall prepare a report that documents the disposition of all cases during the preceding three months. The report shall contain the following information for each case with which the board has completed its activities:

(a) The case number assigned for the complaint or alleged violation pursuant to division (D)(1) of section 4731.22 of the Revised Code;

(b) The type of license or certificate to practice, if any, held by the individual against whom the complaint is directed;

(c) A description of the allegations contained in the complaint;

(d) The disposition of the case.

The report shall state how many cases are still pending, and shall be prepared in such manner as to protect the identity of each person involved in each case. The report shall be a public record under section 149.43 of the Revised Code.

(E) Irrespective of administrative remedies, the board may petition a court of common pleas for a temporary restraining order to suspend a physician's license. The court shall issue such an order if the board demonstrates that immediate and irreparable injury or loss to the public would result from the physician's continued practice of medicine.

(F) Any action taken by the board under division (B) of this section resulting in a suspension from practice shall be

accompanied by a written statement of the conditions under which the certificate holder may be reinstated to practice. The board shall adopt rules governing conditions to be imposed for reinstatement. Reinstatement of a certificate suspended pursuant to division (B) of this section or surrendered to the board by its holder requires an affirmative vote of not less than six members of the board.